Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

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Offense Conduct

DRUG QUANTITY—RELEVANT CONDUCT

Ninth Circuit holds that drugs held solely for personal use should not be used to set offense level for possession with intent to distribute. Defendant pled guilty to possession of cocaine with intent to distribute. He admitted to possessing 80–90 grams, but claimed most of the cocaine was for his personal use and only the 5–6 grams he intended to distribute should be used in sentencing. The district court appeared to agree that personal use amounts should not be used, but determined those amounts could not be distinguished and used the full amount.

The appellate court remanded: "Drugs possessed for mere personal use are not relevant to the crime of possession with intent to distribute because they are not 'part of the same course of conduct' or 'common scheme' as drugs intended for distribution. Accordingly, we hold that in calculating the base offense level for possession with intent to distribute, the district court must make a factual finding as to the quantity of drugs possessed for distribution and cannot include any amount possessed strictly for personal use."

U.S. v. Kipp, 10 F.3d 1463 (9th Cir. 1993).

See *Outline* at II.A.1.

U.S. v. Roederer, 11 F.3d 973 (10th Cir. 1993) (Affirmed: Following interpretation of "same course of conduct" set out in *U.S. v. Perdomo,* 927 F.2d 111 (2d Cir. 1991), court agreed that defendant's cocaine sales in conspiracy that ended in 1987 were relevant conduct for instant offense of cocaine distribution in May 1992: "We hold that the evidence, when viewed in its entirety, establishes that Roederer was actively engaged in the same type of criminal activity, distribution of cocaine, from the 1980s through May, 1992. Roederer's conduct was sufficiently similar and the instances of cocaine distribution were temporally proximate.").

See *Outline* at I.A.2 and II.A.1.

DRUG QUANTITY—OTHER ISSUES

U.S. v. Tavano, No. 93-1492 (1st Cir. Dec. 29, 1993) (Selya, J.) (Remanded: District court erred when it "formulated a per se rule" that evidence presented at trial controls and refused to consider defendant's evidence regarding drug quantity that differed from the testimony at trial. The appellate court held that "both Fed. R. Crim. P. 32(c)(3)(D) and U.S.S.G. § 6A1.3 require a sentencing court independently to consider proffered information that is relevant to . . . the sentencing determination.").

See *Outline* at II.A.3, IX.D.3.

CALCULATING WEIGHT OF DRUGS

U.S. v. Crowell, 9 F.3d 1452 (9th Cir. 1993) (Affirmed: "[W]e join the other Circuit Courts . . . which have held that the weight of the dilaudid tablet, rather than the weight of the hydromorphone, is the proper measure of drug quantity. . . . We find that use of the gross weight of the tablet is entirely consistent with" *Chapman v. U.S.,* 111 S. Ct. 1919 (1991).). *Accord U.S. v. Young,* 992 F.2d 207, 209–10 (8th Cir. 1993).

See *Outline* at II.B.1.

U.S. v. Coohey, 11 F.3d 97 (8th Cir. 1993) (Remanded: Defendant was sentenced for an LSD offense before, but his appeal came after, the Nov. 1993 amendment to § 2D1.1(c) (providing new method to determine weight of LSD). He challenged the old method of including the carrier medium and also challenged the new method, claiming it was arbitrary and violated the Sentencing Commission's statutory grant of authority. The appellate court reaffirmed prior precedent that upheld use of the carrier medium and also upheld the new method. The case was remanded, however, for the district court to consider whether it should retroactively apply the new method pursuant to § 1B1.10(a).).

See *Outline* at II.B.1.

Adjustments

VULNERABLE VICTIM

Sixth Circuit holds that relevant conduct should not be used for § 3A1.1 adjustment. Defendant was convicted of conspiracy to defraud the IRS by filing false tax returns and claiming fraudulent tax refunds. He convinced several people to assist him, and the government claimed that some of these people were "particularly vulnerable in some way" and that defendant "prey[ed] on their vulnerabilities in recruiting them to his scheme." The district court agreed and imposed § 3A1.1's two-level enhancement.

The appellate court remanded, holding "that the language of section 3A1.1 requires that individuals targeted by a defendant be victims of the conduct underlying the offense of conviction." Here, the victim of the offense of conviction was the government, and while some of the others "may have been 'victimized' by Wright in the sense that he may have taken advantage of them, we do not believe they were victims of the offense."

In addition, because "section 3A1.1 applies only in cases where there is a victim of the offense of conviction, we further hold that a court cannot apply the adjustment based upon 'relevant conduct' that is not an element of the offense of conviction. Section 1B1.3 has no application in a section 3A1.1 adjustment."

U.S. v. Wright, No. 93-3055 (6th Cir. Dec. 14, 1993) (Kennedy, J.).

See *Outline* at III.A.1.b.

OBSTRUCTION OF JUSTICE

U.S. v. Haddad, 10 F.3d 1252 (7th Cir. 1993) (Reversed: It was error to give § 3C1.1 enhancement for allegedly threatening prosecutor and attempting to influence witness. "Neither the factual findings made nor the actual record below support an 'obstruction' enhancement" for attempting to influence the witness. As to the alleged threat, § 3C1.1 "must be interpreted and determined on the basis of the language in

[§] 1B1.3(a)(1)," which holds a defendant responsible for conduct "that occurred . . . in the course of attempting to avoid detection or responsibility for that offense." Thus, it would have to be shown "that the acts of the defendant alleged to obstruct or impede justice were done 'willfully' and with the specific intent 'to avoid responsibility' for the offense for which he was being tried. . . . [E]ven if there was a threat (as to which the record is unclear) it is obvious that such acts were not committed 'in the course of attempting to avoid responsibility for the offense of conviction.'").
See *Outline* at III.C.4.

U.S. v. Acuna, 9 F.3d 1442 (9th Cir. 1993) (Affirmed: Defendant's plea agreement required him to cooperate with government investigators and testify truthfully at a coconspirator's trial. The district court held that defendant gave false testimony that merited a § 3C1.1 enhancement. The appellate court affirmed, holding that "violation of a plea bargain warrants a sentence enhancement for obstruction of justice." *See also U.S. v. Duke*, 935 F.2d 161, 162 (8th Cir. 1991) (enhancement warranted where defendant did not provide truthful information as required by plea agreement). The court also agreed with the Tenth Circuit that § 3C1.1 "applies when 'a defendant attempts to obstruct justice in a case closely related to his own, such as that of a codefendant.' *U.S. v. Bernaugh*, 969 F.2d 858, 861 (10th Cir. 1992).").
See *Outline* at III.C.2 and 4.

Departures

Mitigating Circumstances

U.S. v. Cantu, No. 92-30211 (9th Cir. Dec. 27, 1993) (Reinhardt, J.) (Canby, J., concurring in part) (Remanded: District court erred in holding that Vietnam veteran suffering from post-traumatic stress disorder did not have "significantly reduced mental capacity" for purposes of § 5K2.13, p.s. "'Reduced mental capacity' . . . comprehends both organic dysfunction and behavioral disturbances that impair the formation of reasoned judgments. . . . Therefore, a defendant suffering from post-traumatic stress disorder, an emotional illness, is eligible for such a departure if his ailment distorted his reasoning and interfered with his ability to make considered decisions." The fact that defendant also had an alcohol problem did not disqualify him for departure. Under § 5K2.13, defendants "are disqualified only if their voluntary alcohol or drug use caused their reduced mental capacity. . . . If the reduced mental capacity was caused by another factor, or if it, in turn, causes the defendant to use alcohol or another drug, the defendant is eligible for the departure."

The court also joined other circuits that held "the disorder need be only a contributing cause, not a but-for cause or a sole cause, of the offense. . . . [Section 5K2.13] requires only that the district court find some degree, not a particular degree of causation. . . . [T]he degree to which the impairment contributed to the commission of the offense constitutes the degree to which the defendant's punishment should be reduced."

The court added: "Resolution of disputed facts concerning mental impairment requires more than simply a neutral process. The court's inquiry into the defendant's mental condition and the circumstances of the offense must be undertaken 'with a view to lenity, as § 5K2.13 implicitly recommends.' *U.S. v. Chatman*, 986 F.2d 1446, 1454 (D.C. Cir. 1993). Lenity is appropriate because the purpose of § 5K2.13 is to treat with some compassion those in whom a reduced mental capacity has contributed to the commission of a crime.").
See *Outline* at VI.C.1.b.

U.S. v. White Buffalo, 10 F.3d 575 (8th Cir. 1993) (Affirmed: "Lesser harms" departure under § 5K2.11, p.s., was appropriate for defendant convicted of unlawful possession of an unregistered firearm (a .22 single-shot rifle with shortened barrel). Defendant lived in a remote area of an Indian reservation and used the gun solely to shoot animals that preyed on his chickens. He had been steadily employed for a few years and had no prior arrests or convictions. The appellate court affirmed the conclusion that defendant's actions "were not the kind of misconduct and danger sought to be prevented by the gun statute," and rejected the government's contention that § 5K2.11 should not be applied to possession of shortened unregistered weapons. *Cf. U.S. v. Hadaway*, 998 F.2d 917, 919–20 (11th Cir. 1993) (district court may consider § 5K2.11 departure for defendant convicted of possessing unregistered sawed-off shotgun) [6*GSU* #4].

The district court erred, however, in finding that departure was also justified under § 5K2.0 for the kind of personal and community factors upheld in *U.S. v. Big Crow*, 898 F.2d 1326 (8th Cir. 1990). The facts were simply "not sufficiently unusual" to support departure. However, "§ 5K2.11 provided a legally sufficient justification for departure in this case," and "the district court reasonably exercised its discretion in imposing probation" after departing from offense level 15 to 8. *Cf. U.S. v. One Star*, 9 F.3d 60, 62 (8th Cir. 1993) (upholding departure to probation from 33–41-month range) [6*GSU* #8].).
See *Outline* at VI.C.1.a, generally at VI.C.4, and X.A.2.

General Application Principles

Stipulation to Additional Offenses

U.S. v. Saldana, No. 93-10050 (9th Cir. Dec. 20, 1993) (Nelson, J.) (Remanded: Defendant pled guilty to three drug counts; twelve food stamp counts were dismissed, but the stipulation of facts in the plea agreement provided evidence of the food stamp offenses. The district court held that it had discretion whether or not to consider the food stamp counts under § 1B1.2(c) and declined to do so. The appellate court held this was error: "Nothing in the Guidelines, the commentary, or prior decisions of this court support a conclusion that a district court is free to ignore the command of § 1B1.2(c) requiring it to consider additional offenses established by a plea agreement."). *Cf. U.S. v. Moore*, 6 F.3d 715, 718–20 (11th Cir. 1993) (Affirmed: Under § 1B1.2(c), the district court "*was required* to consider Moore's unconvicted robberies, to which he stipulated in his agreement, as additional counts of conviction . . . under section 3D1.4 . . . . Even if the parties had agreed that these unconvicted robberies were to be used . . . in some other way, the district court *was obligated* to consider these unconvicted robberies as it did.").
To be included in *Outline* at I.B.

Criminal History

Other Sentences or Convictions

U.S. v. Kipp, 10 F.3d 1463 (9th Cir. 1993) (Remanded: State deferred sentence that had no supervisory component, and was treated by the district court as a suspended sentence, did not warrant two criminal history points under § 4A1.1(d). "[A] suspended sentence, standing alone without an accompanying term of probation, is not a 'criminal justice sentence,' as that term is used in § 4A1.1(d)."). *Cf. U.S. v. McCrary*, 887 F.2d 485, 489 (4th Cir. 1989) (because § 4A1.2 requires actual imprisonment to count as "sentence of imprisonment," improper to count suspended sentence with no imprisonment).
See *Outline* at IV.A.5.